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ABSTRACT

This paper discusses some of the ramifications of federal laws and associated court decisions that provide the legislative foundation for education of American Indians. The legislation reviewed includes the Johnson O'Malley Act, Impact Aid laws, the Elementary and Secondary Education Act, the Indian Elementary and Secondary School Assistance Act, the Indian Civil Rights Act, the Education for All Handicapped Children Act, the Indian Self-Determination and Educational Assistance Act, the Indian Child Welfare Act, the Elementary and Secondary Improvements Amendments, and the Native American Languages Act. The effects of these laws on Bureau of Indian Affairs (BIA) schools and the level of control permitted to tribes and parents are evaluated. Most federal legislation that impacts the education of Indian children has been targeted at educational policies and practices for all children. This includes the Goals 2000 legislation because it requires the BIA to establish a panel to oversee implementation in BIA schools. While authority for overseeing the federal trust responsibility for Indian people remains with the BIA, contemporary education agendas have been directed to include laws and regulations that impact public school districts as well. References include 11 public laws, 7 court cases, and 7 books and articles. (RAH)

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# The Impact of Federal Legislation on the Education of American Indian Students

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**The Impact of Federal Legislation**

**on the Education of American Indian Students**

The single most significant legislative action in the education of American Indian students since the movement of the Bureau of Indian Affairs from the Department of War to the Department of Interior in 1849 was the passage of the Indian Self-Determination Act in 1975[1]. The effects of its passage less than twenty years ago include increased legislative and presidential support for Indian control of local education policies and programs. While the overall impact of federal legislation on public schools is minimal, the federal government does influence public education through the Department of Education's establishment of funded programs. American Indian students in public schools are affected by those programs in much the same way that other minorities are affected. American Indian students in BIA schools are impacted additionally by legislation which specifically targets BIA schools; however, the BIA currently estimates that it serves less than 11 percent of the total school age Indian children in this country.

Several laws which impact Indian students were incorporated in legislation which sought to protect parental rights in this country (e.g., Education of all Handicapped Children Act [2]), yet have far reaching consequences in Indian education. Silverman (1992 [3]) asserts that tribal control over education has received more federal deference than the interests of other parents in this country. Some evidence for this can be found in the legislation directed at the operation of public school programs specifically for Indian students and the legislation which has redefined the role of Indian parents in the operation of Bureau of Indian Affairs (BIA) funded schools.

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1 U. S.C. § 450 (1991).

2 20 U.S.C. § 1400 (1975).

3 Silverman, J.E. (1992). The miner's canary: Tribal control of American Indian Education and the First Amendment. Fordham Urban Law Journal. 19, 1019-1046.

Historically, Indian parents did not have the opportunity to be involved in local decision-making until this recent legislation.[4] In boarding schools, parents have acquiesced to the doctrine of *in loco parentis* (Briscoe, 1980 [5]). The operation of schools, particularly those funded by the BIA have routed parental grievances and complaints through the federal system and parents have not used the federal courts. Avenues for redress of grievances within the federal system are complex and include complicatations regarding jurisdictional issues.

The authority for overseeing the federal trust responsibility for Indian people has been incorporated into the BIA, within the Department of Interior. Historically, this branch of the federal government has represented **the** authority in Indian country, particularly during periods of assimilation. Contemporary BIA education activities are more narrowly focused as a result of legislation.

The BIA's activities focus on the fulfillment of federal trust responsibility to tribal entities. It is important to understand that this trust responsibility relates to tribal interests. While education is not considered a trust responsibility, activities within the Bureau (BIA) are divided into one of two primary categories: education (ED) and the balance of the bureau (BOB) which oversees resources.

While education within the BIA has many functions, its is commonly understood as control of reservation boarding schools. Currently, the BIA operates 186 schools and dormitories. Boarding schools were originally designed as instruments of assimilation; yet recently, the Bureau has entered into contracts permitting local tribal or community control of some schools.

Over the years, the Bureau has been "bashed" and bitterly criticized. One fundamental complaint against the BIA's administration of trust responsibility goes beyond the BIA to the Department of Justice. The BIA maintains the responsibility for defending the tribes' assets. Threats to these assets can come from other agencies within the Department of the Interior and their constituencies. As Interior's stepchild, the BIA does not have the political clout to battle these other agencies. The obvious consequence is that Indian interests may suffer when compromises are made at the Secretary's level.

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4 Indian Self-Determination and Secondary School Assistance, 25 U.S.C. § 2601-2651 (1991)

5 Briscoe, L. S. (1980). The legal background of in loco parentis as applied to the education of Indian children. Emergent Leadership. 4 (2), 24-31.

The trust relationship between the BIA and the tribes can be better evaluated when conflict is moved to the courtroom. The BIA is initially represented by the Solicitor's office within the Department of Interior and, if the matter should go to court, by the Department of Justice. Both of these offices have responsibilities to other agencies; frequently agencies with which the tribes are in conflict. Conflict of interest specifically involving Indian tribes is not unusual within the government. The Supreme Court has made it clear that in such circumstances, tribes cannot be favored[6] . Tribes are not relieved of the *res judicta* effect of a judgment merely because the government represented both the tribes and those who competed with them[7] .

While the trust responsibility for education has been debated and ignored by different occupants of the Executive branch over the years, the courts have supported education for Native Americans. The courts have asserted in some opinions that while no legal obligation can be found in an analysis of treaties, the federal history of emphasizing its moral obligation for education is obvious[8] . Considering the history of Indian-non-Indian affairs, the number of court cases which specifically address education is minimal. This may be correlated with the relatively small number of laws which specifically address educational issues for Indian students. Several pieces of significant legislation are, in fact, a minor portion of other legislation directed at non-Indian issues.

**Legislation**

The education of American Indian students is impacted by federal legislation on several levels. The following federal laws provide the legislative foundation for education of American Indians.

- Johnson O'Malley Act
- Impact Aid
- Indian Civil Rights Act
- Elementary and Secondary Education Act
- Indian Elementary/Secondary School Assistance Act

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6 Nevada v. United States, 463 U.S. 110, 127 (1983).

7 Arizona v California, 460 U.S. 605, 626-28 (1983).

8 Northwestern Bands of Shoshone Indians v. U.S. (1945) and Prince v. Board of Education 1975

- Education for All Handicapped Children Act
- Indian Child Welfare Act
- Elementary and Secondary Improvements Amendments
- Native American Languages Act

**Legislation directed at Non-Indians**

The first legislation which affected Indian schools, Indian students, parents and tribes in any substantial manner ( e.g., increased resources) were minor sections of laws which affected public school funding. The Johnson O'Malley Act[9] (passed in 1934 and reauthorized as recently as 1991) was the impetus for parent committees to oversee the activities funded in this program. The actual authority for spending money remained with the fiscal agents at the local public school, therefore, whether an intended or unintended consequence of this legislation only minimal individual parent input was ever achieved.

Impact Aid laws passed in 1950[10] (and reauthorized in 1991) have been the center of considerable debate over the years. Impact Aid monies are grounded in the government to government relationship of the United States and federally recognized tribes. This funding is directed at public school districts which are impacted significantly by the absence of a tax base as the result of district boundaries which include non-taxable (specifically trust) land. Indian parents have input into the application processes and may individually or collectively use the formal complaint system in dealing with public school districts; however, there are many areas where the public schools have the ultimate decision-making authority over the usage of these funds.

One of the earliest attempts to respond to the needs of Indian students and parents, in terms of curricular input, was again a rider to legislation that was designed primarily for public school education. In 1965 with the passage of the Elementary and Secondary Education Act [11], public schools were targeted to make curricular reform efforts for Indian populations. Prior to this time, state schools lacked any obligation to offer programs specifically for Indian children, even in school districts with large Indian

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9 Johnson O'Malley Act, 25 U.S. C. § 452-27 (1991)
10 Impact Aid, 20 U.S. C. § 236-45 (1991)
11 Elementary and Secondary Act of 1965, 20 U.S. C. § 2701-2713

populations and this legislation sought to encourage more tribal and individual parental involvement. Specifically it began to fund "special supplementary programs for the education and culturally related needs of Indian students". [12]

In 1975, Congress passed The Education of All Handicapped Children Act, P.L. 94-142[13]. Parents of students with handicaps were assured in this legislation the right to participate in the assessment and program planning processes for their children. For the first time all parents were to become partners with professionals in the decision-making process. Studies by educational researchers[14] found that one of the major inhibitors to this shared decision-making was language. Many minority students were from homes where English was the second language. Many families did not speak the language of the majority culture--the language of IEPs. Problems with decision-making opportunities for Indian parents have been compounded by the fact that there are very few minority personnel in special education and the tools for assessment remain culturally biased.

One concern by Indian parents has been assessment and placement into programs. Despite change and the inclusion of additional criteria for labeling children, a disproportionate number of Indian students continue to be labeled for special education purposes. For years, there was substantial support for the notion that minority language students were likely to be slow learners, if not because of low mental ability, then because of the disadvantage of their language handicap. Public Law 94-142 is another example of legislation directed at a non-minority group which has had significant impact on the education of Indian children.

In 1978, Congress passed several Education Amendments in P.L. 95-561[15]. One of the riders of this legislation was directed at schools operated by the BIA. In response to the increased awareness in Indian country of the needs of Indian students and the limited ability of the Bureau to respond to local concerns, this law was intended to authorize parental involvement by redefining the role of the local

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12 2701 (a)

13 Education of All Handicapped Children Act, 20 U.S. C. § 1400 (1975)

14 Lynch, E. W. and Stein, R. C. (1987). Parent participation by ethnicity. Exceptional Children, 54, 2, 105-111.

15 25 U.S. C. § 2001-2019 (1991)

school board. The local boards of Bureau schools were given more specific authority over general decision-making at the schools, including a voice in the hiring of school officials, specifically administrative positions. In practice, the authority relinquished to parent school boards was determined by the local school administrator and/or the local school superintendent (Education Program Administrator). Since the fiscal accountability still resided with the school administrators, some schools had participatory decision-making; others did not. So while the intent was to provide local boards with a larger role in the control of local schools, this was not guaranteed by provisions within the law. In an examination of the language of the law, one can readily see the narrow focus. This Act established the official policy of the BIA to "facilitate Indian control of Indian affairs in all matters relating to education."

After the Indian Self-Determination Act, It is nearly ten years before we find legislation which addresses specific needs of Indian communities for education services. This legislation, The Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary Improvement Amendments of 1988 [16] passed on April 28 1988 and strengthened the role of parental involvement in Indian schools by authorizing resources. Prior to this time, an Indian school board could contract, through the tribe, to operate a school; however, there were still layers of fiscal management which diverted money from local school operations. This Act authorized the Bureau of Indian Affairs to provide outright grants to tribally controlled schools. Local school boards were provided with more autonomy to make curricular and operational decisions.

**Legislation Directed at Indian Populations**

The Indian Elementary and Secondary School Assistance Act[17] in 1968 authorized tribes to bid for discretionary aid for education programs such as demonstration schools or pilot projects for the improvement of educational opportunities. This Act dealt with state school funding. This legislation sought to involve Indian parents in a more meaningful role in the development of educational priorities for their children. The programs supported by this Act were conditional based on consultation with Indian parents and approved by an Indian parent committee.

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16 P.L. 100-297

17 25 U.S. C. § 2601-2651 (1991)

In 1975, with the initial passage of the Indian Self-Determination and Educational Assistance Act [18] (reauthorized in 1991), tribes were authorized to contract with the federal government to administer schools for Indian children. Section 2 (b) (3) emphasized that parental and community control of the educational process was of crucial importance to Indian people. Part A-Education of Indians in Public Schools addressed parental input specifically in Section 5 (a) "whenever a school district affected by a contract...has a local school board not composed of a majority of Indians, that parents of the Indian children enrolled in the school/s affected shall elect a local committee from among their number. Such committee shall participate fully in the development, and shall have the authority to approve/disapprove programs to be conducted under such contract/s.

The language of this Act specifically underscores Congress' intent to "promote maximum Indian participation in the government and education of Indian people."[19] . While the focus of this legislation is not education, the Act does reflect the beginning of an era which underscores and begins to reestablish tribal sovereignty. Tribal sovereignty is a prerequisite for the establishment of policies and programs which reflect the wishes of local communities, i.e., parents in the educational programs designed for their children.

That same year, Congress passed the Indian Civil Rights Act of 1968[20]. This legislation required the basic protections for speech, religion, due process, and equal protection be extended to reservations. This legislation requires that educators provide the same considerations to Indian students that are found in the Bill of Rights.

In 1978, Congress passed the Indian Child Welfare Act[21] . This Act was designed to protect the integrity of tribes and the heritage of Indian children by inhibiting the practice of removing those children from their families and tribes to raise them as non-Indians.[22] Under the Act, state courts have no jurisdiction over adoption or custody of Indian children who are domiciled or reside within the reservation

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18 U.S. C. § 450 (1991)

19 H.R. Rep. No. 1600, 93rd Congress, lst Sess.1 1974

20 25 U.S.C. § 1301 et seq.

21 25 U.S. C. § 1901-1963 (1978)

22 Cf. Wakefield v. little Light, 276 Md. 333, 347, A 2d 288 (1975).

of their tribe, unless some federal law (such as Public Law 280) confers such jurisdiction. The Act has been held to preempt a state rule that would have shifted the domicile of an abandoned Indian child from that of the parent on the reservation to his would-be adoptive parents off the reservation.[23] State courts have no jurisdiction over children who are wards of a tribal court, regardless of domicile or residence. Jurisdiction of these cases lies exclusively with the tribe. State courts have some jurisdiction over adoption and custody of Indian children not domiciled or residing on their tribe's reservation, but this jurisdiction is subject to important qualifications. For example, in any proceeding for foster care placement or termination of parental rights, the state court "in the absence of good cause to the contrary" and in the absence of objection by either parent, must transfer the proceeding to tribal court upon the petition of either parent, the child's Indian custodian, or the tribe. The tribe may decline such a transfer[24]. The states are required to give tribal adoption and custody orders full faith and credit[25].

While not specifically addressing education, the Indian Child Welfare Act reinforces other legislation. Indian parental rights are, for the most part, subjugated to the wishes of the tribe in matters of welfare for a child, including education. The primary consideration here is the opportunity for the child to remain cognizant of the culture (including language) in order to protect the identity of the group and ultimately the individual.

On October 30, 1990, President Bush signed The Native American Languages Act[26] which Congress had passed to protect the "status of the cultures and languages of Native Americans (a)s unique." Further, it stated that the United States "has the responsibility to act together with native Americans to ensure the survival of these unique cultures and languages[27]. Congress made it a policy of the United States to "preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American Language"[28]. Finally, the Act emphasized that "the right of Native Americans to express themselves through the use of Native American languages shall not be

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23 Matter of Adoption of Halloway, 732 P2d. 962 (Utah, 1986).
24 25 U.S.C.A. § 1911 (b).
25 25 U.S.C.A. § 1911. (d).
26 25 U. S. C. § 2903 (1990)
27 p. 1153
28 p. 11155

restricted in any public proceeding, including publicly supported educational program(s)"[29]. The implications of this Act for Indian parents are obvious. First from a general administrative perspective, the Act continues the policy of Indian self-determination, particularly as it pertains to the tribal government authority when acting for parents. Second, it is a reversal of the assimilation practices/policies which discouraged parents from teaching Native language to their children.

The most significant Supreme Court ruling on language usage relies solely on Title VI of the Civil Rights Act of 1964[30] as interpreted by the Office of Civil Rights. The Court noted that to require that children have required basic English skills before participating in an educational program "mocks" public education. In Lau v. Nichols[31], the Supreme Court did not propose a remedy for bilingual students; however, it did propose that schools provide one. There have been no cases adjudicated as a result of limited English proficiency by Native American students; however, in 1968 Congress authorized the Bilingual Education Act[32] (reauthorized in 1978) which has provided grants for bilingual education projects, related research and teacher training for bilingual students.

President Clinton signed legislation[33] recently which declares the 29 tribally controlled colleges to be land-grant institutions. This legislation is designed, through the addition of the 1994 institutions, to provide the opportunity for these colleges to compete for resources which were previously available to institutions specified in legislation for land grant institutions[34].

Summary

While the authority for overseeing the federal trust responsibility for Indian people remains with the BIA, contemporary education agenda have been directed to include laws and regulations which impact public school districts as well. The majority of the federal legislation which includes sections that impact the education of Indian children has been legislation targeted at education policies and practices in

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29 p. 1155-1156
30 42 U.S. C. § 2000 (d) et seq. (1988)
31 Lau v. Nichols, 41 U.S. 563 (1974)
32 20 U.S. C. § 3281-3341 (1988)
33 The Chronicle of Higher Education, November 8, 1994, p.
34 The Morrill Act of 1862

general. Even the Goals 2000[35] legislation has the potential to impact Indian children because it requires the BIA to establish a panel to oversee the implementation in BIA schools.

Congress has a long record of providing categorical aid to schools and colleges in the states and a legislative record that provides concrete evidence of the continued growth of a national federalism. While categories continue to be revised or consolidated, reversal of this policy seems unlikely. The shift to such a trend in recent years is still met with resistance in some parts of Indian country.

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35 P.L. 103-227

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